SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CL

No. 73-268

In the Supreme Court of the United States

OCTOBER TERM, 1973

IRVING POLCOVER, PETITIONER

v.

SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks reinstatement in his federal job, alleging that his discharge for bribery was illegal since the government relied on testimony adduced at his criminal trial on the same charges (of which he was acquitted), the witness against him was not produced, and the hearings provided were inadequate.

In 1964 petitioner, an Internal Revenue Agent with eighteen years of federal service and a Veterans Preference Act beneficiary, was suspended and subsequently removed from his job for accepting a bribe in connection with the audit of a tax return and failing to report it. Petitioner pursued his administrative appeal rights, and a hearing was scheduled. Before it could be held, the United States Attorney for the Southern District of New York requested that administrative action on the appeal be held in abeyance pending completion of

criminal proceedings against petitioner. Petitioner subsequently was indicted, tried, and acquitted on a two-count bribery charge. The administrative hearing on his appeal of the dismissal action was then held. The primary evidence against appellant at the hearing was the transcript of testimony given at the trial by Mr. Goldstein, the alleged briber. The Hearing Examiner found that a preponderance of the evidence sustained the charges, and his decision was affirmed throughout the remainder of the administrative appeal process.

Thereafter, on July 18, 1969, petitioner filed suit for reinstatement and back pay. The district court, on consideration of cross motions for summary judgment, granted the government's motion and dismissed the action. The Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. B).

Contrary to petitioner's contentions (Pet. 25-27) the court of appeals applied the proper standard of review, fully considered petitioner's arguments, and found them to be without merit. No further review is warranted.

1. There was ample evidence before the Hearing Examiner to support the charges made against petitioner, including a sworn affidavit by Mr. Goldstein, the alleged briber, the transcript of the criminal trial, and work papers of Mr. Goldstein and his client which tended to support the allegation of bribery (Pet. App. B, p. 14). Petitioner's contention that the agency failed to meet its burden of proof is without merit.

2. Even though petitioner was acquitted in the criminal proceedings, this did not bar his dismissal from federal service on the same evidence. Proof by a preponderance of the evidence justifies the discharge of a federal employee; he cannot be convicted in criminal

proceedings unless the charge is proved beyond a reasonable doubt. See *Finfer* v. *Caplin*, 344 F. 2d 38 (C.A. 2), certiorari denied, 382 U.S. 883; *Silver* v. *McCamey*, 221 F. 2d 873 (C.A.D.C.)

3. Petitioner did not request the production of the witness against him until the end of the hearing. The request was thus not timely, and was properly denied. *Williams* v. *Zuckert*, 371 U.S. 531. Moreover, the witness had been subjected to extensive cross-examination by petitioner at the criminal trial, and his testimony on cross-examination was part of the record before the Internal Revenue Service and the Civil Service Commission. Consequently petitioner's lack of opportunity to reconfront the witness was not a denial of due process.

4. The court of appeals did not, as petitioner alleges, find that his removal was in violation of the Veterans Preference Act. Instead it refused to consider the contention, first raised on appeal, that an "oral reply officer" was not a proper official to hear petitioner's reply to the notice of proposed adverse action. It noted that the record was devoid of any reference to the powers of the "oral reply officer", and that despite ample opportunity, this defect had not been raised below, where the record could have been supplemented (Pet. App. B, pp. 19-26).

5. Finally, petitioner alleges that he has a Fifth Amendment right to a full trial-type hearing before his discharge. This issue is now pending before this Court in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted April 2, 1973.[1]

[1]Although action was apparently taken against petitioner under 5 U.S.C. 7512, governing Veternas Preference Act beneficiaries, while Kennedy was discharged under 5 U.S.C. 7501, the Lloyd-Lafollette Act covering other non-probationary federal employees, neither statute provides for a full trial-type hearing before discharge, and neither employee received one.

The Court may accordingly wish to defer action on this petition until after its decision in *Kennedy*. We note only that petitioner has been accorded a full hearing subsequent to his discharge and the agency has considered and rejected his contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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